24

DEC 31 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 510

CHARLES REDCAY WARFEL, as Assignee for the Benefit of Creditors of The Hansel Company, a partnership,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant,

and

BANK OF HAWAII,

Third Party Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

GENDEL & RASKOFF and
BERNARD SHAPIRO,
617 South Olive Street,
Los Angeles 14, California,
Attorneys for Petitioner.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

PAGE

Opinion below 2

Jurisdiction 2

Questions presented 2

Statutes involved 4

Introduction 4

Statement of facts 6

Actual endorsement 14

Authorized endorsement 14

Comment upon the facts and the opinion below 13

Reasons for granting the writ 16

I.

The Court of Claims erred in holding that Bischoff had ostensible authority to endorse the check. This ruling is contrary to prevailing law 16

II.

The court below erred in assuming that Keys had authority to endorse and cash the check and its holding is directly contrary to California law 18

III.

The Court of Claims erred in holding that the burden rested with petitioner to disprove Keys' ostensible authority. This is in direct conflict with California law 21

IV.

The court below erred in holding that the proceeds of the check went into the intended account 24

PAGE

V.

The issuance of a writ of certiorari to review the opinion of the Court of Claims is of utmost importance, to prevent the opinion of the Court of Claims from being used in the future and by other courts in exonerating banks from liability where they have honored forged payee endorsements and improper subsequent endorsements..... 26

Conclusion 27

DARK PAGE BL

TABLE OF AUTHORITIES CITED.

CASES

	PAGE
California Stucco Co. v. Marine Nat. Bank, 148 Wash. 341, 268 Pac. 891	17
Dingley v. McDonald, 124 Cal. 682	20
Hammond Lumber Co. v. Weeks, 105 Cal. App. 315	21
Schwarz v. Bank of Pgh. Nat. Ass'n, 283 Pa. 200	17
Standard Steam Specialty Co. v. Corn Exchange Bank, 220 N. Y. 478, 116 N. E. 386	17

STATUTES

Act of June 25, 1948, Chap. 646, Sec. 1 (62 Stat. 928)	2
California Civil Code, Sec. 2022	4, 19
California Civil Code, Sec. 2349	3
California Civil Code, Sec. 2349	4, 19
California Civil Code, Sec. 2350	4, 19
United States Code, Title 28, Sec. 1255(1)	2

TEXTBOOKS

7 American Jurisprudence, Sec. 526, p. 380	17
5 California Jurisprudence, Ten-Year Supp., p. 600	21
10 California Jurisprudence, p. 656	21
2 Corpus Juris Secundum, p. 1173	13
Restatement of Law of Agency, Sec. 114	13
Restatement of Law of Agency, Sec. 124	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. .....

CHARLES REDCAY WARFEL, as Assignee for the Benefit of Creditors of The Haneel Company, a partnership,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant,

and

BANK OF HAWAII,

Third Party Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Charles R. Warfel, as assignee for the benefit of creditors of The Haneel Company, a partnership, prays that a writ of certiorari issue to review the final judgment of the United States Court of Claims, which judgment was entered on July 9, 1951. Petition for Rehearing was timely filed before the United States Court of Claims by your petitioner and the said motion

was denied by the Court on October 2, 1951. Judgment of the United States Court of Claims was rendered in favor of the United States and the Third Party and against your petitioner who was plaintiff before that Court and the judgment held, in effect, that petitioner could not recover the amount of a check drawn by the United States of America upon the Third Party Bank of Hawaii in favor of your petitioner's assignor, which check was misappropriated by a former employee of petitioner's assignor.

Opinion Below.

The opinion of the United States Court of Claims, including Special Findings of Fact, has been transmitted to this Honorable Court by the United States Court of Claims as part of the entire record therein.

Jurisdiction.

The judgment of the United States Court of Claims was filed on July 9, 1951 and a petition for rehearing was denied on October 2, 1951. The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1255(1), as amended; 62 Stat. 928, June 25, 1948, ch. 646, §1.

Questions Presented.

(1) If limited authority in the form of a special signature authorization card filed with a branch of a bank has been given an agent to endorse and cash the checks of the principal, may the bank assert an estoppel against the payee where:

(a) The endorsement was by one not named on the authorization card, and

(b) the endorsement itself fraudulently purported to be that of the payee, and

(c) the employees of the cashing bank did not testify that they relied upon the authorization card when they cashed the check, and

(d) the endorsement showed on its face that it was improper and outside the authority set forth in the authorization card.

2. Does the fact that a former agent might have defrauded his principal by wrongfully endorsing checks payable to the principal by attempting to use an uncancelled authorization card inadvertently remaining with a depository bank entitle that bank to assert an estoppel against the principal where:

(a) the former agent caused his subagent to endorse the check, and

(b) the subagent endorsed the check in a manner not authorized by the authorization card, and

(c) the employees of the bank were not called to testify that they had relied upon the authorization card when they cashed the check, and

(d) the endorsement showed on its face that it was improper and outside the authority set forth in the authorization card.

3. Under California law, and particularly under California Civil Code Section 2349, may a limited special agent authorize a subagent to endorse checks payable and belonging to the principal?

Statutes Involved.

1. Section 2022 of the California Civil Code: "A mere agent of an agent is not responsible as such to the principal of the latter."

2. Section 2350 of the California Civil Code: "If an agent employs a subagent without authority, the former is a principal and the latter his agent, and the principal of the former has no connection with the latter."

3. Section 2349 of the California Civil Code:

> "An agent, unless specially forbidden by his principal to do so, can delegate his powers to another person in any of the following cases, and in no others:
>
> 1. When the act to be done is purely mechanical;
>
> 2. When it is such as the agent cannot himself, and the sub-agent can lawfully perform;
>
> 3. When it is the usage of the place to delegate such powers; or,
>
> 4. When such delegation is specially authorized by the principal."

Introduction.

The United States Navy sent a check by mail to The Haneel Company, a partnership. The check was payable to the order of "Haneel Company." The Security-First National Bank of Los Angeles honored the following endorsement thereon:

The Haneel Company
By James V. Keys, Co-owner
44 Pay to the Order of 44
Security-First National Bank
of Los Angeles
Tri-Vision Sales Company

James V. Keys was never a co-owner of The Haneel Company; he had no connection therewith and this was a forged endorsement. A branch of this bank was once authorized, by a special signature authorization card, to honor the endorsement, "The Haneel Company, Tri-Vision Sales *Agency* by Ed. A. Bischoff," but the subsequent stamped endorsement on the Navy check was erroneously "Tri-Vision Sales *Company*," and was not signed by Ed. A. Bischoff. Accordingly, the stamped endorsement was also at variance with the authorization card.

The Court of Claims has held that the Security Bank was entitled to accept the forged payee endorsement and the improper deposit endorsement and that the bank incurred no liability by placing its own clearing house endorsement thereon whereby it guaranteed all prior endorsements.

This holding places in jeopardy the nationwide practice of authorizing individuals to endorse or sign checks for another. The opinion of the Court of Claims affects more than ordinary endorsements: it may be used in cases involving signatures by makers and endorsements by payees. Businessmen must be assured that special powers, in writing, to endorse will be strictly followed by banks. Otherwise, these limited authorizations must be abandoned. Businessmen must also be assured that checks cannot be cashed by forged payee endorsements.

Statement of Facts.

Petitioner, Charles R. Warfel, since April 15, 1946, has been the common law assignee for the benefit of creditors of The Haneel Company, a partnership composed of MacNeel Pierce and Nathan O. Hulsey doing business as Plastic & Rubber Products Company at 2100 Hyde Park Boulevard and also at 2124 Hyde Park Boulevard in Los Angeles, California. [Special finding of fact No. 1.]

The Haneel Company shipped certain merchandise to the United States Navy in Oahu, Territory of Hawaii, on or about March 12, 1946, based upon certain orders previously given to The Haneel Company. The Navy received the merchandise, as well as certain invoices covering the shipment in the total sum of $14,005.30. The Haneel Company made written demand upon the Navy (Ship's Service Department) for payment of that amount. [Special finding of fact No. 2.]

On December 19, 1946 the Ship's Service Officer at the United States Naval Ammunition Depot in Oahu addressed a letter to The Haneel Company at 2100 Hyde Park Boulevard and enclosed a check in the sum of $14,005.30 drawn on the Bank of Hawaii, Waipahu Branch, made payable to the order of The Haneel Company, 2100 Hyde Park Boulevard. [Special finding of fact No. 3.] The check, with the endorsements thereon, has been transmitted to this Court as plaintiff's Exhibit No. 5.

DARK PAGE BL

The check was endorsed in the following manner:

"The Haneel Company
By James V. Keys, Co-owner
44 Pay to the Order of 44
Security-First National Bank
of Los Angeles
Tri-Vision Sales Company"

The first endorsement, "The Haneel Company by James V. Keys, Co-Owner" was written in pen and ink and the next endorsement, "Pay to the Order," etc., was made by a rubber stamp. [Special finding No. 9, Pltf. Ex. 5.]

James V. Keys was not and never had been a co-owner of The Haneel Company, nor was he ever associated with that organization in any manner whatsoever. Instead, Mr. Keys was apparently associated with one Ed. A. Bischoff, of the Tri-Vision Sales Company [Special finding of fact No. 6] and both Mr. Keys and Mr. Bischoff were joined as parties to this action by the United States of America but those defendants defaulted and have never participated in the proceedings except as witnesses. Neither of them has ever asserted a legal right to the check, or its proceeds.

Mr. Bischoff entered the picture sometime in 1945 when The Haneel Company undertook to sell and distribute cameras and related items. Bischoff was engaged to act as a sales agent with offices on the premises of The Haneel Company; he used the fictitious firm name of "Tri-Vision Sales Agency" and he apparently used The Haneel Company stationery at certain times. [Special finding of fact No. 4.]

After several months, and on or about February 25, 1946, Bischoff opened a bank account in the name of "Tri-Vision Sales Agency" in a branch of the Security-First National Bank of Los Angeles, 49th and Western Branch. At that time The Haneel Company, by MacNeel Pierce, signed and delivered to the bank an authorization card reading as follows:

"SECURITY-FIRST NATIONAL BANK OF LOS ANGELES:

"Until otherwise ordered in writing, you are hereby authorized to accept the endorsement *The Haneel Company, Tri-Vision Sales Agency.* By *Ed. A. Bischoff* on any checks or other items payable to me or to my order, and to pay to said *Ed. A. Bischoff* the amount represented by any such items or to deposit such items to his personal account or to any account he may direct; and I hereby agree to hold you harmless against any damage or expense to which you may be put by reason of your acting under this authorization.

"The Haneel Company
by: MacNeel Pierce

Address *2100 Hyde Pk. Blvd.*
Date *Feb. 25, '46* *Los Angeles 44, Calif."*

This authorization card [Finding No. 5] is a controlling factor in this petition and it has been transmitted to this Court as defendant's Exhibit No. 6. Except for the parts italicized above, the card is a printed form. [Special finding of fact No. 5.]

As shown by the record, the foregoing transactions between Bischoff and the petitioner's assignor and with the

Security-First National Bank occurred before the sale of the cameras to the United States Navy and before the common law assignment to the petitioner herein. Within approximately a month after the petitioner assumed his duties as the representative of the creditors of The Haneel Company, he made certain arrangements with Bischoff which were memorialized in an agreement dated May 23, 1946 and which are a part of the record before this Honorable Court as plaintiff's Exhibit No. 6.

After the assignment, but before the agreement of May 23, 1946, Bischoff organized the "Tri-Vision Sales *Company*" (Italics ours) and also changed the name of his bank account to the new fictitious firm name. [Special finding of fact No. 5.] In the May 23, 1946 agreement, Bischoff's newly organized Tri-Vision Sales Company was required to issue purchase orders to petitioner (operating, in this phase of its business, as Plastic & Rubber Products Company) and petitioner would cause units to be shipped and would invoice Bischoff for each unit. As a security procedure, Bischoff, as Tri-Vision Sales Company, was required to assign all invoices to petitioner, as well as all funds and/or negotiable paper in payment of the assigned invoices; all C. O. D. shipments and payments were to be delivered intact to petitioner. Petitioner, in turn, would remit to Bischoff all credit balances, if any, as they occurred. [Pltf. Ex. 6.]

Shortly after this arrangement (as shown in the agreement of May 23, 1946) had been set up, Bischoff moved his business from the premises of petitioner to a new lo-

cation some distance away. [Special finding of fact No. 4.]

At the time of the agreement of May 23, 1946, and up until the present day, Bischoff was and is heavily indebted to petitioner. An agreement was executed on September 18, 1946 for the purpose of liquidating and satisfying this debt, [Pltf. Ex. 8] but it was never satisfied as is evidenced by a compromise and settlement agreement dated November 20, 1947. [Pltf. Ex. 4.]

At about this time, (that is, during the months of April and May, 1946 when the new formalized procedure was set up to continue the operations of petitioner and Bischoff) mail directed to The Haneel Company was ordered to be forwarded by the postmaster to Bischoff at his new location. The court below has found that this order was "apparently at the direction of Mr. Campbell," an employee of petitioner. [Special finding No. 7.] Your petitioner, however, unequivocally testified that he did not know of any such transfer of The Haneel Company mail and that when he first learned of it, he countermanded any such understanding in the mind of the postmaster. [Tr., p. 73, Q. 185; p. 87, Q. 252.]

This was the situation as it existed on or about January 4, 1947 when Mr. Keys, apparently a partner or associate of Bischoff, opened a letter addressed to The Haneel Company and containing the Navy check now in dispute. Keys testified that he opened the letter and after talking with Bischoff on the telephone, placed the endorsement on the check that has heretofore been set forth. At this

point, it would appear desirable to show the endorsement placed upon the check by Mr. Keys alongside the endorsement authorized by the card deposited with the 49th and Western Branch of the Security-First National Bank:

Actual Endorsement	Authorized Endorsement
"The Haneel Company By James V. Keys, Co-owner 44 Pay to the Order of 44 Security-First National Bank of Los Angeles Tri-Vision Sales Company"	"The Haneel Company, Tri-Vision Sales Agency. By Ed. A. Bischoff"

[Special finding of fact No. 9.]

Keys testified, and the court so found, that the check was deposited in the account of Tri-Vision Sales Company and was credited to that account. In due course, the Bank of Hawaii paid to the Security-First National Bank the amount of the check from the funds of the defendant United States. [Special finding of fact No. 9.]

The court below found that Keys had placed the endorsement on the check and deposited the same with the Tri-Vision Sales Company account, pursuant to instructions from Bischoff and that Keys never was a co-owner of The Haneel Company nor had he ever any ownership or other interest therein. [Special finding of fact No. 9.]

It is a fact, and the court below so found, that the proceeds of the check were never given either to petitioner or to his assignor, but the court also found that the petitioner had learned that Bischoff received the Navy check a few weeks after such receipt. [Special finding of fact No. 10.] Petitioner testified that he had not learned of the

conversion of the check by Bischoff until he had received advice from the United States Navy [Tr., p. 74, Q. 172] and it is clear, from the evidence, that petitioner consistently wrote to the Navy with regard to the whereabouts of the check and asked for a photostatic copy thereof when the Navy finally determined the facts. [Tr., p. 36, Q. 12.]

It is interesting to note that Bischoff testified that he had often endorsed checks made payable to The Haneel Company, even after the assignment to petitioner [Tr., p. 176, Q. 288], but the Court made no finding upon this testimony. Neither the United States nor the Third Party Defendant saw fit to introduce evidence from any representative of the Security-First National Bank to this effect. From the state of the record, and from the findings of the Court, one must conclude that the agreement of May 23, 1946 [Pltf. Ex. 6] was adhered to and that Bischoff never endorsed checks made payable to The Haneel Company after that date—if, indeed, he ever endorsed the Haneel Company checks.

So far as the record shows, Mr. Keys never endorsed any Haneel Company check except the one here in dispute, since his testimony is mute on this point, and he apparently considered himself obligated to call Bischoff before handling the instant check in the manner hereinabove related. In any event, it is undisputed that there was never any authorization given to Keys to endorse and deposit checks made payable to The Haneel Company, nor was Keys a co-owner of The Haneel Company.

Comment Upon the Facts and the Opinion Below.

Though it has been necessary to relate the facts at some length, petitioner places particular stress upon the difference between the endorsement authorized and the endorsement actually used. At the outset it is important to note that Bischoff had no actual authority to endorse checks made payable to The Haneel Company after the assignment, irrespective of the agreement of May 23, 1946, since his authority was terminated by operation of law owing to the insolvency of his principal. (Rest. Agency, Secs. 114, 124; see generally cases cited 2 C. J. S. 1173.) Assuming however, that the 49th and Western Branch of the Security-First National Bank of Los Angeles was entitled to rely upon its uncancelled authorization card, it is logical to expect that one would look at that card to determine the basis for such reliance. The card in the hands of the 49th and Western Branch could not, under any stretch of imagination, have been relied upon by individuals at the Alhambra Branch for the acceptance of Keys' endorsement upon the disputed check. In the first place, *Bischoff was the only one authorized to endorse the checks and he did not endorse; Keys' name was placed upon the endorsement. In the second place, Keys did not endorse the check as the Tri-Vision Sales Agency but as a co-owner of The Haneel Company, which he was not. In the third place, after fraudulently holding himself out to be the co-owner of The Haneel Company, he then placed a further endorsement on the check as the Tri-Vision Sales Company and not as the Tri-Vision Sales Agency.*

It is the contention of the petitioner that the endorsement was an outright forgery and was accepted by the bank under the mistaken belief, or the sheerly negligent

assumption, that Keys was a co-owner of The Haneel Company. Had the bank relied upon the authorization card, it could never have accepted the endorsement of Keys because of the overwhelming dissimilarity between the endorsement used and the endorsement allegedly authorized.

The opinion below, nevertheless, relies upon the endorsement card; the Court of Claims has assumed that the petitioner is in some way estopped to deny the authority set forth in the authorization card. As hereinabove stated, the authorization card could not have been relied upon by the bank. Even more, as will be shown in a later section of this Petition, under California law the contention of estoppel must be grounded in proof. A severe and stringent burden of proof rests with a party claiming estoppel. It is significant that neither the defendant nor the Third Party introduced any evidence to support the contentions of the estoppel, except for the placing in evidence of the authorization card. This failure of proof, this failure to produce a single employee or agent of the bank who would state such reliance is destructive of the contention of estoppel.

The Court of Claims assumed, however, that the petitioner has no basis for complaint because the check was deposited in the very account that was contemplated by the unrevoked authorization card. Petitioner is frank to state that it does not understand this reasoning. The mere possibility that Bischoff could have misappropriated the funds (as far as the bank was concerned) by endorsing the check in the manner set forth in the authorization card cannot excuse the improper endorsement used on this check. Petitioner puts forth the proposition that it is more logical to assume that Bischoff did not endorse

the check as shown on the authorization card because he did not dare to do so in the face of the revocation of his authority. Instead, Bischoff injected a stranger into the transaction and gave himself a cushion on which he could later fall; if any question should arise, he could contend that there had been a misunderstanding. Keys, on the other hand, could make the same claim. It is incredible to believe that Keys innocently assumed a fact that he knew was not true, to wit, that he was a co-owner of The Haneel Company. This was a deliberate untruth, calculated to deceive not only the petitioner but the bank as well. Had Bischoff intended to endorse the check in accordance with the authorization card that he well knew contained no force, he would hardly have instructed Keys to endorse the check as a co-owner of The Haneel Company. By the same token, if Keys had endorsed the check in the ordinary course of events as an associate of Bischoff and the Tri-Vision Sales Company, he would hardly set forth that he was a co-owner of The Haneel Company.

The check, therefore, did not go where it was authorized to go. It was no mere technical variance between the actual and the allegedly authorized endorsement that should be forgiven and forgotten because the proceeds went into the "proper" account. Instead, there was a fraudulent and criminal misappropriation of petitioner's funds which he was to hold for the benefit of all of the creditors and this fraud was based upon the false endorsement setting up Keys as a co-owner of The Haneel Company. There was never any belief on the part of the employees of the bank that this was an endorsement authorized by any authorization card.

REASONS FOR GRANTING THE WRIT.

I.

The Court of Claims Erred in Holding That Bischoff Had Ostensible Authority to Endorse the Check. This Ruling Is Contrary to Prevailing Law.

The opinion of the court below concedes that Bischoff had no actual authority to endorse the check involved in this case. It holds, however, that the existence of the authorization card gave Bischoff (and, therefore, Keys) ostensible authority, so far as the Security-First National Bank was concerned, to make an endorsement thereon.

This ruling by the Court of Claims renders insecure the position of any principal who delegates the authority to his agent to endorse commercial paper by means of authorization cards entrusted to banking institutions, as was done in the present case.

It is a matter of common knowledge that business firms and individuals carefully set forth on authorization cards the endorsements that are permissible on commercial paper made payable to designated payees. It is of utmost importance that businessmen be assured that the banking institution will be responsible where significant deviations occur from such prescribed authorized endorsements. In the present case, for example, it has been pointed out in the immediately preceding section of this petition that it is inconceivable that the bank could have passed the endorsement on the Navy check upon the basis of the authorization card deposited with it. The bank could rely

upon the authorization card only if the endorsement used actually conformed with it. The general rule is as stated in 7 Am. Jur., Banks, Section 526 at page 380:

> "It is also to be observed that the authority of the bank to make payments in this respect may depend upon the form of signature by the agent. It is well settled generally that the signature upon which a debtor is to be bound and the bank is to be authorized to disburse money may be whatever they agreed on. Therefore, when the debtor authorizes the bank to pay checks signed by his agent in a particular manner, the bank is authorized only in paying checks signed by each in such manner."

The petitioner cited several cases to the court below covering this principle:

Standard Steam Specialty Co. v. Corn Exchange Bank (1917), 220 N. Y. 478, 116 N. E. 386;

Schwarz v. Bank of Pgh. Nat. Ass'n (1925), 283 Pa. 200;

California Stucco Co. v. Marine Nat. Bank (1928), 148 Wash. 341, 268 Pac. 891.

All of the foregoing cases state that where authority is given to accept a certain endorsement, a bank has no right to accept a different endorsement. The court below distinguished these cases upon the ground that they were concerned with situations where an agent was authorized to endorse specially (usually for deposit to the credit of the principal), and where the agent endorsed in blank and converted the proceeds. It is true that these cases dealt with situations where the agent converted the proceeds rather than depositing them in the account of the principal, but were this the only point of these cases,

there would have been no need to discuss the variations from the authorized form of endorsement. The mere fact that the agent had converted the proceeds rather than depositing them would have been sufficient. Nevertheless, the courts in each of these cases condemned the action of the bank involved for the reason that the endorsements varied from the one allowed.

At the risk of unnecessarily repeating the point, petitioner wishes to make it clear that there was no evidence introduced in the instant case to support a claim that the bank relied upon the authorization card in its possession, since the authorization card bears no similarity to the endorsement actually used.

II.

The Court Below Erred in Assuming That Keys Had Authority to Endorse and Cash the Check and Its Holding Is Directly Contrary to California Law.

The Court of Claims has assumed, erroneously in the first instance, that Bischoff had ostensible authority to endorse the check. It has been demonstrated that Bischoff might have had ostensible authority (as far as the bank was concerned) to endorse the check in a certain manner, but certainly not in the manner actually used. From this misconception, the Court of Claims has proceeded to a further and more grievous error: The Court assumes that if Bischoff had ostensible authority, the bank was authorized, or justified, in accepting the endorsement of Keys.

The petitioner cited authority to the court below, to demonstrate that such a position would be directly con-

trary to California law, yet, the court's opinion fails to discuss this point. Keys, as an agent of Bischoff, was in no way responsible to Bischoff's principal:

> "A mere agent of an agent is not responsible as such to the principal of the latter." (Cal. Civ. Code, Sec. 2022.)

By a parity of reasoning and statutory authority, the principal was in no way responsible for or bound by the subagent since the principal had no knowledge of the subagent and had not authorized his employment.

> "If an agent employs a sub-agent without authority, the former is a principal and the latter his agent, and the principal of the former has no connection with the latter." (Cal. Civ. Code, Sec. 2350.)

Finally, there is a particular portion of the California Civil Code, Section 2349 which circumscribes the power of an agent to delegate his own powers:

> "Powers Delegable.—An agent, unless specifically forbidden by his principal to do so, can delegate his powers to another person in any of the following cases, and in no others:
>
> 1. When the act to be done is purely mechanical;
>
> 2. When it is such as the agent cannot himself, and the sub-agent can lawfully perform;
>
> 3. When it is the usage of the place to delegate such powers; or
>
> 4. When such delegation is specially authorized by the principal."

It is clear that the authority to endorse paper and deposit the same in the agent's own account to do with as he pleases cannot be delegated to a subagent under any

of the specifically enumerated portions of the foregoing Code sections. The only contention that could be made in this regard is that the act was "purely mechanical." There is nothing mechanical about endorsing negotiable paper made payable to another where the proceeds from that paper do not flow to the payee directly. This is a highly delicate form of dealing with the property of another and one does not entrust that power to a person with the idea that the discretion will be exercised by someone else. The California Supreme Court has held, for example, that where the cashier of a bank has been given authority by the bank to take all necessary steps he may deem best in the matter of the bank's claim against another bank, there is, nevertheless, no power on the part of the cashier to delegate authority to an attorney to assign that claim or even to substitute the attorney as general agent of the bank instead of the cashier—even though the assignment was purely for the purposes of collection only.

Dingley v. McDonald (1899), 124 Cal. 682.

This case was one dealing solely with the delegable powers of an agent. The court states that the case was one ". . . based upon a special trust and confidence reposed in his personal ability and integrity, and the rule is that such power, in the absence of authority, express or implied, cannot be redelegated by the agent so as to bind the principal."

Even, therefore, if the principal were misled in reposing trust and confidence in Bischoff at one time, he was not reposing that trust and confidence in any other. Banks must be mindful that authority to endorse negotiable paper rests only in the person to whom the authority is specifi-

cally granted and not in any other. Bischoff's authority to endorse paper had long since terminated when this check was misappropriated and he did not even possess the limited powers of redelegation that might rest with an actual agent. The Court of Claims here has stacked ostensible authority upon ostensible authority for the purpose of reaching a result outside the contemplation of any of the parties.

III.

The Court of Claims Erred in Holding That the Burden Rested With Petitioner To Disprove Keys' Ostensible Authority. This Is in Direct Conflict With California Law.

It is implicit in the opinion of the court below that the burden rested with petitioner to show that an estoppel did not exist. The court has reversed the burden of proof and the substantive requirements of pleading and proving estoppel under California law. Indeed, no voluminous citations of authority are required on this point because the California law is clear beyond question. As the California Appellate Court has stated in the case of *Hammond Lumber Co. v. Weeks* (1930), 105 Cal. App. 315:

> "Estoppel is not favored, and it is incumbent upon one who advanced it to prove its dominant essentials, leaving nothing to silence or questionable inference."

(See also numerous cases cited in 10 Cal. Jur., p. 656, and Ten-Year Supp. thereto, Vol. 5, p. 600.)

No evidence was introduced by the United States or the Third Party Defendant to show that the bank relied upon the authorization card. No agent or employee of the bank was called to testify in this regard. No photostatic records of the bank were placed in evidence to show whether previous checks made payable to The Haneel Company had been endorsed in the manner used respecting the endorsement of the Navy check. The defense rested upon the very slim proposition that the mere placing of the authorization card with the 49th and Western Branch of the Security-First National Bank constituted an insuperable barrier to any claim of negligence and wrongdoing upon the part of the Alhambra Branch of the same bank. There is nothing in the record, for example, to show whether this special authorization card deposited with the 49th and Western Branch of the bank had even been seen by the officers or agents of the Alhambra Branch. For all that appears in the record, this authorization card might have rested at 49th Street and Western Avenue at Los Angeles from the beginning to the end of this matter until resurrected by the attorneys for the Third Party Defendant at the time of trial herein. No member of the bank was even called to testify that this authorization card had been transmitted to Alhambra.

It is difficult for petitioner to understand how the Court of Claims could have ignored this principle of California law, which is a principle of law generally, to wit, that estoppel must be proved by the party asserting it. Whether called estoppel or ostensible authority, the party setting

up the defense must show that in some way he relied upon something or believed that there was ostensible authority. Except for the authorization card (which was never proved to have been in the hands of the Alhambra Branch or in the active files of the 49th and Western Branch of the Security-First National Bank) the record is absolutely mute respecting reliance or knowledge upon the part of the Security-First National Bank.

Petitioner wishes to stress that he makes this allegation of total absence of evidence with no reservations of any kind whatsoever. This is not an instance of partisanship where testimony is ignored or misinterpreted by a litigant for the purpose of asserting that there is no evidence to support the judgment of the court below. Only Bischoff and Keys were called for the defense in this case and neither of them could testify that the signature card had been relied upon by the bank. They could not know what was in the mind of the employee of the bank who accepted the endorsement. Bischoff testified that he himself had endorsed other commercial paper payable to The Haneel Company but his testimony upon this point was apparently not convincing or believed because the Court of Claims refused to make a finding thereon. In any event, such testimony could not supply the requirement of proof upon the part of the person that claimed the reliance and Bischoff never testified he ever endorsed as an owner of The Haneel Company.

IV.

The Court Below Erred in Holding That the Proceeds of the Check Went Into the Intended Account.

This point has been discussed at some length under the COMMENT UPON THE FACTS section of this petition. The statement by the Court of Claims that, "there was no injury to plaintiff occasioned by the fact that Bischoff deposited through an agent" is, in a manner of speaking, difficult to attack directly.

The point is so ingenious that, with no intended discourtesy, it might have been germinated in Alice in Wonderland. Bischoff had no authority to endorse the check. Keys had no authority to endorse the check. Had Bischoff endorsed the check in his own name, in the manner set forth on the authorization card, he might have testified in the present case upon leave from a penal institution. Had he endorsed it as the co-owner of The Haneel Company, such would have undoubtedly been the case.

Keys was not a co-owner of The Haneel Company and had no authority from The Haneel Company to endorse checks. He could excuse his endorsement only on the ground that he received some instructions from Bischoff. Bischoff merely stated that he told Keys to put the check in his account. Neither of them has attempted to explain the reason for Keys' endorsement as a co-owner of The Haneel Company.

The assignee did not know of the authorization outstanding at the 49th and Western Avenue Branch of the

Security-First National Bank. He drew up a security procedure with Bischoff to protect against the use by Bischoff of Haneel Company accounts. The assignee had no dealings as a depositor, or otherwise, with the Security-First National Bank and would have had no occasion to notify it of the change in Bischoff's status. The assignee did not know that the mail had been diverted to Bischoff and, therefore, had no reason to advise the United States that the check should be sent otherwise than in the manner in which it was actually sent. The assignee had no reason to tell the postmaster that Haneel Company mail should not go to Mr. Bischoff because the assignee did not know that such mail was given to Bischoff.

There can be no question but that the creditors represented by the petitioner herein lost $14,005.30 by the fraudulent endorsement so negligently passed by the Security-First National Bank. To state that the bank would be guiltless if Bischoff himself had endorsed the paper in the specific manner authorized (and if the bank were to prove that it relied upon that authorization) is hardly to meet the issue. Some party who did not profit from the transaction must bear the loss since Bischoff and Keys (who did profit) have shown by their default in this case that they are unconcerned.

DARK PAGE BLEEDTHRU

V.

The Issuance of a Writ of Certiorari to Review the Opinion of the Court of Claims Is of Utmost Importance, to Prevent the Opinion of the Court of Claims From Being Used in the Future and by Other Courts in Exonerating Banks From Liability Where They Have Honored Forged Payee Endorsements and Improper Subsequent Endorsements.

The recognition of the endorsement by Keys in the present case is so patently negligent under all of the facts, that it is safe to say that no cancellation of the authority given the 49th and Western Avenue Branch would have changed the event that actually occurred. The Alhambra Branch of the bank honored Keys' signature, not because of that signature card but because he fraudulently endorsed the check as the co-owner of The Haneel Company. The authorization card that had been deposited with the 49th and Western Avenue Branch has been, until now, successfully interposed between the petitioner and recovery as the only defense that could be set up and neither the United States nor the Third Party thought enough of this defense to call witnesses to support it. The signature card was a gamble that has paid handsome rewards for the defense. It has paid these rewards because the Court of Claims has ignored California law and the ordinary facts of commercial life. If this sort of card can be interposed as a defense to a fraudulent endorsement that bears no resemblance to the authorization, then all reasons for these cards have been destroyed. Banks are thereby authorized to accept any endorsement of any kind whatsoever so long as some person who was once authorized to endorse in a certain manner has granted some-

body else the authority to endorse in an entirely different manner—in fact, as an alleged co-owner of the payee itself.

The judgment in the instant case, therefore, is not only in direct violation of the California and the general law, but it is destructive of a very common and important device used by businessmen in their relations with banks. It is important that the Court of Claims and all federal courts recognize the California principles of agency and estoppel in deciding cases arising out of contracts made in California, and that businessmen dealing with the United States Government shall be assured that disputes will be decided in accordance with governing law and in accordance with good business practice generally.

Conclusion.

The Court of Claims has exonerated all of the parties before it and has placed the loss upon the creditors of the innocent payee. Keys and Bischoff, who would ultimately bear the loss, took no action in their own defense and demonstrated that they had no response to the charges leveled against them. They defaulted when the United States joined them as third parties. It is, of course, understood that neither the United States nor the Third Party Bank of Hawaii, was negligent in any way. Gross negligence was committed by the Security-First National Bank of Los Angeles and this bank was not a party to the present litigation. The Third Party Bank of Hawaii merely relied upon the clearing house endorsement of the Security Bank.

The effect of all of the exonerations by the Court of Claims in this litigation is the further exoneration of the negligent party, the Security Bank. That bank supplied

no evidence toward the defense in this case except the authorization card which it hoped would be accepted as the basis for the honoring of the endorsements placed on the check by Keys. The Security Bank sent none of its agents or employees to testify for the reason that they could not, in good conscience, state on the witness stand that they used this authorization card when they honored Keys' endorsement. It is submitted that any such employee of the bank would have been compelled to admit that he accepted the Keys endorsement because he assumed that Keys was the co-owner of The Haneel Company.

Citations of authority are unnecessary to establish the proposition that a payee shall not be charged with a forged endorsement where the payee did not receive the proceeds of the check and the forger *has* received such proceeds. Yet, the Court of Claims by its ruling in this case, has arrived at a contrary result.

Wherefore your petitioner prays that this Court issue a writ of certiorari reviewing the judgment of the United States Court of Claims, entered on July 9, 1950, as described in the within petition, and that the judgment of the said United States Court of Claims be reversed.

Respectfully submitted,

GENDEL & RASKOFF and
BERNARD SHAPIRO,
By MARTIN GENDEL,
Attorneys for Petitioner.

DARK PAGE BLEEDTHRU

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	8
Conclusion	11

CITATIONS

CASES:

Beeson-Moore Stave Co. v. *Clark County Bk.*, 160 Ark. 385, 254 S. W. 667	9
Clearfield Trust Company v. United States, 318 U. S. 363	2
Couture v. *Ocean Park Bank*, 205 Cal. 338, 270 Pac. 943	9
Federal Land Bank v. *Omaha Nat. Bank*, 118 Nebraska 489, 225 N. W. 471	9
National Metropolitan Bank v. *United States*, 323 U. S. 454	2
Standard Oil Co. v. *Johnson*, 316 U. S. 481	10

STATUTE AND REGULATIONS:

Negotiable Instruments Law, Section 23	8
Air Force Regulations 147-7	2
Paragraph 25	10
Army Regulations 60-10	10
Paragraph 25	10
U. S. Navy Regulations, Art. 1972	2